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4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**

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7 R. ALEXANDER ACOSTA
8 *Secretary of Labor, United States Department of*
9 *Labor*

10 Plaintiff(s),

11 v.

12 KIZZANG LLC; ROBERT ALEXANDER;
13 KIZZANG LLC HEALTH PLAN

Defendant(s).

Case No. 2:18-cv-01559-RFB-BNW

ORDER

14 **I. INTRODUCTION**

15 Before the Court is Plaintiff R. Alexander Acosta's ("the Secretary") Motion for Default
16 Judgment. ECF No. 16. For the following reasons, the Court grants the motion.

17 **II. PROCEDURAL BACKGROUND**

18 The Secretary filed its complaint against Defendants on October 10, 2018 for violations of
19 the Employment Retirement Income Security Act ("ERISA") (29 U.S.C. §§1001-1191c). ECF No.
20 1. The Secretary filed an amended complaint on October 10, 2018. ECF No. 3. Defendants Kizzang
21 LLC and Robert Alexander were both served on October 18, 2018. ECF No. 8. The Secretary
22 moved for entry of clerk's default on November 30, 2018, and the Clerk entered default on
23 December 3, 2018. ECF No. 10. The Secretary moved for default judgment on June 24, 2019. ECF
24 No. 16. This written order now follows.

25 **III. FACTUAL ALLEGATIONS**

26 The Secretary alleges as follows in the first amended complaint and motion for default
27 judgment: Defendant Kizzang LLC ("Kizzang") was an online website for games and sweepstakes
28 headquartered in Las Vegas that ceased operating in 2017. Kizzang established the Kizzang LLC

1 Health Plan (the “Plan”) around 2013 and served as the Plan Administrator. Defendant Robert
2 Alexander was the president and majority owner of Kizzang and a resident of Las Vegas, Nevada.
3 The Plan was a fully insured health and welfare plan that was established by Kizzang around March
4 2013. The Plan offered its employees medical, dental, and vision coverage. The Plan was funded
5 by salary reduction contributions by employees and by employer contributions. Kizzang covered
6 100% of the premium for the lower-level medical policy. However, if a participant enrolled a
7 dependent or decided to enroll in the higher-level medical policy, it was the participant’s
8 responsibility to pay the additional premium cost through payroll deductions.
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10 Kizzang served as Plan Administrator and was responsible for collecting and forwarding
11 employee contributions withheld from participants’ paychecks to the Plan and for satisfying the
12 notice, disclosure, and other obligations placed on administrators by ERISA. Defendant Alexander
13 was an authorized signatory to the Kizzang’s bank account with the authority to transfer funds to
14 and from this action. Kizzang and Defendant Alexander failed to forward withheld employee
15 contributions to the Plan and to collect the employer contributions owed to the plan. Instead of
16 remitting these withheld employee contributions to the Plan, Defendants retained and commingled
17 these Plan assets with the Kizzang’s general banking accounts so these amounts could be used for
18 non-Plan purposes. Defendants also failed to warn participants that their medical insurance was
19 subject to retroactive cancellation because the fiduciaries failed to pay the required premiums or
20 could not guarantee that future payments would be paid. Records from Anthem, the Plan’s insurer,
21 indicate that the amounts of employees' claims that were not paid because the medical service was
22 provided after coverage had been terminated due to nonpayment of premiums by Defendants was
23 \$83,389.07. Another \$16,417.98 was deducted from the paychecks of covered employees and not
24 forwarded to the Plan.
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1 The Secretary now brings claims for violations of 29 U.S.C. §1103(c)(1); 29 U.S.C. §
2 1104(a)(1)(A); 29 U.S.C. § 1104(a)(1)(B); 29 U.S.C. § 1106(a)(1)(B); 29 U.S.C. § 1106(a)(1)(D);
3 and 29 U.S.C. § 1106(b)(1) and (b)(2).

4 **IV. LEGAL STANDARD**

5 The granting of a default judgment is a two-step process directed by Rule 55 of the Federal
6 Rules of Civil Procedure. Fed. R. Civ. P. 55; Eitel v. McCool, 782 F.2d 1470, 1471 (9th Cir.
7 1986). The first step is an entry of clerk's default based on a showing, by affidavit or otherwise,
8 that the party against whom the judgment is sought "has failed to plead or otherwise defend." Fed.
9 R. Civ. P. 55(a). The second step is default judgment under Rule 55(b), a decision which lies
10 within the discretion of the Court. Fed. R. Civ. P. 55(b); Aldabe v. Aldabe, 616 F.2d 1089, 1092
11 (9th Cir. 1980).

12 Factors which a court, in its discretion, may consider in deciding whether to grant
13 a default judgment include: (1) the possibility of prejudice to the plaintiff, (2) the merits of the
14 substantive claims, (3) the sufficiency of the complaint, (4) the amount of money at stake, (5) the
15 possibility of a dispute of material fact, (6) whether the default was due to excusable neglect, and
16 (7) the Federal Rules' strong policy in favor of deciding cases on the merits. Eitel, 782 F.2d at
17 1471-72.

18 If an entry of default is made, the Court accepts all well-pleaded factual allegations in the
19 complaint as true; however, conclusions of law and allegations of fact that are not well-pleaded
20 will not be deemed admitted by the defaulted party. DirecTV, Inc. v. Hoa Huynh, 503 F.3d 847,
21 854 (9th Cir. 2007). Additionally, the Court does not accept factual allegations relating to the
22 amount of damages as true. Geddes v. United Financial Group, 559 F.2d 557, 560 (9th Cir. 1977).
23 Default establishes a party's liability, but not the amount of damages claimed in the pleading. Id.

1 **V. DISCUSSION**

2 The Court finds that the granting of default judgment against Defendants Kizzang and
3 Alexander is warranted. The Court finds that the Secretary would be prejudiced by its inability to
4 carry out its enforcement of ERISA if it is not allowed to obtain default judgment against
5 defendants. The Court also finds that the Secretary has well-pleaded factual allegations that
6 support a finding that Defendants committed multiple ERISA violations. Defendants failure to
7 appear in this action, while understandable on the part of Kizzang as it is no longer an extant
8 company, does not appear to be excusable on the part of Defendant Alexander, who was served in
9 2018 and has yet to appear in the action. The Court further finds it unlikely that there will be a
10 dispute of material facts, as evidence concerning the payments that were not properly forwarded
11 came from Defendant Kizzang's own internal files. While both the Federal Rules' policy in favor
12 of deciding cases on the merits and the amount of money at stake (\$99,807.05) caution against the
13 granting of default judgment, the Court does not find that either factor so heavily weighs against
14 entry of default judgment in this instance. See Employee Painters' Tr. v. Ethan Enters., Inc., 480
15 F.3d 993 (9th Cir. 2007) (upholding entry of \$1,030,344.95 default judgment against corporate
16 employer for delinquent contributions under ERISA).

17 **VI. CONCLUSION**

18 **IT IS THEREFORE ORDERED** that Defendants Kizzang and Alexander are jointly and
19 severally liable for **\$99,807.05** and judgment is hereby entered against them in that amount
20 ("Judgment Amount"). The Judgment Amount is comprised of: (a) \$16,417.98 in Plan losses in
21 the form of outstanding employee contributions not forwarded to the Plan; and (b) \$83,389.07 in
22 Plan participants' uncovered medical claims resulting from their loss of health insurance coverage
23 because the Plan fiduciaries failed to pay insurance premiums.

24 **IT IS FURTHER ORDERED** that Kizzang LLC is hereby removed as Administrator of
25 the Plan and Defendant Robert Alexander is removed as a fiduciary of the Plan.
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1 **IT IS FURTHER ORDERED** that Defendant Robert Alexander shall make payment of
2 the judgment directly to the Plan participants within 90 days of Entry of this Default Judgment.
3 Defendant Alexander will contact the San Francisco Office of EBSA for a summary of the portion
4 of the Judgment amount due and owing to each Plan participant. The San Francisco Office of
5 EBSA can be contacted at:
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7 Employee Benefits Security Administration
8 United States Department of Labor
9 90 7th Street, Suite 11-300
10 San Francisco, CA 94103-6712
11 (415) 625-7822


12 **IT IS FURTHER ORDERED** that Defendants Kizzang LLC and Robert Alexander are
13 permanently enjoined and restrained from violating the provisions of Title I of ERISA, 29 U.S.C.
14 §§ 1001- 1191c.

15 **IT IS FURTHER ORDERED** that except with respect to ensuring payments are made to
16 the appropriate participants of the Plan Robert Alexander is hereby permanently enjoined and
17 restrained from future service as a fiduciary of, or service provider to, any ERISA covered
18 employee benefit plan.

19 This Court retains jurisdiction of this action for purposes of enforcing compliance with the terms
20 of this Order.

21 The Clerk of the Court is instructed to close the case.

22 DATED April 10, 2020.

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RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE